(3)

No. 01-1174

Supreme Court, U.S.
FILED
MAR 14 2002

IN THE

Supreme Court of the United States

IN RE: BALBIR SINGH TULI,

Debtor.

BALBIR SINGH TULI,

Petitioner,

—v.—

SPRECHER ENERGIE A.G.; SPRECHER + SCHUH GROUP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ALSTOM (SCHWEIZ) AG AND ALSTOM, INC. IN OPPOSITION

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THE QUESTIONS PRESENTED FOR REVIEW

1. Is this an appropriate case for resolving an alleged conflict between the United States Courts of Appeals for the Third and Ninth Circuits concerning the interplay of Sections 553 and 1141 of the Bankruptcy Code (which respectively govern setoff rights and the effect of confirmation of a plan), when:

a) Section 1141 terminates creditors' rights in property covered by the plan "*except as otherwise provided . . . in the order confirming the plan*" (emphasis added);

b) The *Ninth Circuit*, in the case at bar, *affirmed* a *confirmation order that expressly carved out and preserved Respondents' setoff rights*; while, in marked contrast,

c) *No provision was made for setoff rights* in the plan, or the order confirming the plan, *in the allegedly conflicting Third Circuit case*;

d) The instant case involves (i) the discretion of the United States Bankruptcy Court for the District of Arizona, Phoenix Division (the "Bankruptcy Court") in fashioning an order confirming a plan, rather than (ii) determining (as the Third Circuit did) the impact of Section 553 on a final order confirming a plan; and

e) The Ninth Circuit decision is consistent with the "majority rule"?

2. Is there an actual "case or controversy" before this Court, since:

a) Petitioner has not sought review of the Ninth Circuit's affirmance of the Bankruptcy Court's dismissal, without prejudice, of Petitioner's adversary proceeding against the Respondents; and

b) Petitioner's claims against Respondents are now time-barred?

PARTIES TO THE PROCEEDING

The correct names of the Respondents are:

Alstom (Schweiz) AG (listed in the caption as "Sprecher Energie A.G."); Alstom, Inc.; and Swisslog Holding AG ("Swisslog") (listed in the caption as "Sprecher + Schuh Group").

Alstom (Schweiz) AG and Alstom, Inc. are both indirect subsidiaries of Alstom, a French corporation whose shares are publicly traded on the Paris stock exchange and whose depository receipts are publicly traded in the United States and the United Kingdom. There is only one shareholder, Franklin Resources, Inc., of San Mateo, California, reported to own 10% or more of Alstom's shares.

Swisslog is not a party to this Brief, and Alstom (Schweiz) AG and Alstom, Inc. have no knowledge or information concerning the ownership of Swisslog.

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STATEMENT OF THE CASE

In 1982, Sprecher Energie AG, a predecessor of Alstom (Schweiz) AG ("Alstom"), a Swiss corporation, awarded a written subcontract to Consort Constructions Ltd. ("Consort"), an Indian company, to perform certain civil engineering work in connection with Alstom's erection of a series of power plants for Iraq. (Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") June 9, 1999 Memorandum ("6/9/99 BAP Mem."), RA[1] 8.) When Consort failed to perform timely or satisfactorily, Alstom ordered Consort off the job. (*Id.* at RA 9.) Thereafter, Consort and Alstom exchanged letters in which each asserted that the other had breached the subcontract. (*Id.*)

A. The Adversary Proceeding

An involuntary bankruptcy petition was filed against Petitioner in 1991 and the Bankruptcy Court entered an order of relief that same year. (*Id.*)

In December 1992, Petitioner, who claimed to be an assignee of Consort, commenced arbitration against Alstom before the International Chamber of Commerce ("ICC") in Paris, seeking damages for Alstom's allegedly wrongful termination of the subcontract. The same month, Petitioner commenced an adversary proceeding (the "Adversary Proceeding") in the Bankruptcy Court against (i) Alstom, (ii) Alstom, Inc. (a U.S. affiliate of Alstom), and (iii) Swisslog, an unrelated company, alleging essentially the same claims as the ones asserted in the ICC arbitration. (*Id.* at RA 9-10.)

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[1] Citations to Petitioner's Appendix are preceded by the letter "A". Citations to these Respondents' Appendix are preceded by the letters "RA".

Alstom moved to dismiss the Adversary Proceeding on various grounds, including that the subcontract provided for binding ICC arbitration of all claims between Consort (Petitioner's purported assignor) and Alstom. The Bankruptcy Court, after a number of hearings and extensive briefing by the parties, in April 1994 ultimately stayed the Adversary Proceeding pending ICC arbitration. (*Id.* at RA 10.)[2]

Later in 1994, the ICC dismissed the arbitration because Petitioner failed to pay his share of the fees of the ICC and the arbitrators. More than two years later, the Bankruptcy Court *sua sponte* issued an order to show cause why the Adversary Proceeding should not be dismissed for failure to prosecute. In February 1997, after repeated warnings, the Bankruptcy Court dismissed the Adversary Proceeding, without prejudice, for, *inter alia*, failure to prosecute. (*Id.* at RA 10.) Petitioner appealed to the BAP, which affirmed the Bankruptcy Court's dismissal order. (*Id.* at RA 22.)

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[2] Petitioner is in error when he asserts, in paragraph 2 of his Concise Statement of the Case, that the Bankruptcy Court stayed the Adversary Proceeding to "allow Alstom . . . and other respondents to discharge their onus to establish their claims to setoff in any court or arbitration". The Bankruptcy Judge, during a hearing held on July 21, 1993, stated that he was "probably leaning in the direction of directing arbitration under the contract" because: "One, that's what's in the contract. That's what was agreed to. Two, this case probably deals with a lot of Swiss law, and if we were to try it, probably an awful lot of the witnesses aren't even in the United States, and so you've got legitimate forum nonconvenience problems for at least some of the parties, maybe all of the parties, you have a judge who has never read Swiss law, certainly never looked at the extent Iraqi law would be applicable for any reason, . . . [w]e have one of the heaviest case loads in the country right here . . . and I think this case would put a real strain on us." (Adversary Proceeding Dkt. Entry No. 158 (Transcript of July 21, 1993 Hearing, pp. 19-20).)

B. The Proofs of Claim

In 1996, Petitioner filed two proofs of claim in the Bankruptcy Court, against himself, purportedly on Alstom's behalf, but without Alstom's knowledge or consent. (Memorandum Decision of the United States Court of Appeals for the Ninth Circuit ("9th Cir. Mem."), RA 4.) Petitioner's unauthorized filing was another attempt by Petitioner to do indirectly that which the Bankruptcy Court had prohibited him from doing directly, namely, litigating in the Bankruptcy Court his claims against Alstom arising out of Consort's subcontract for civil engineering work in Iraq. (June 30, 1999 BAP Memorandum ("6/30/99 BAP Mem."), RA 25.) Alstom moved to strike or, in the alternative, to withdraw the unauthorized proofs of claim, because Alstom's position has consistently been that any disputes between Petitioner and Alstom could be resolved only through ICC arbitration, as provided in Alstom's contract with Consort, Petitioner's alleged assignor. The Bankruptcy Court granted Alstom's motion to withdraw the proofs of claim. The BAP affirmed, on the ground that Petitioner had failed "to demonstrate that withdrawal of the claims would cause him any prejudice." (6/9/99 BAP Mem.), RA 20.)

C. The Amended Confirmation Order

Notwithstanding (i) the dismissal of the Adversary Proceeding and the ICC arbitration and (ii) the Bankruptcy Court's warning to Petitioner that "it would not approve any plan of reorganization that deprived [the Alstom Respondents] of their right to contest whether they owed money to [Petitioner]" (6/30/99 BAP Mem., RA 26), Petitioner filed a plan of reorganization that, *inter alia*, purported to "confirm" Petitioner's right to sums that he claimed Alstom owed Petitioner under the

subcontract with Consort. At Alstom's request, the Bankruptcy Court duly amended the order confirming the plan to equally preserve (i) any claims that Alstom had against Petitioner, as well as (ii) any claims that Petitioner had against Alstom. (*Id.*) Petitioner appealed to the BAP, which affirmed the Bankruptcy Court's order. (6/30/99 BAP Mem.), RA 33.)

D. The Ninth Circuit Decision

Petitioner appealed to the Ninth Circuit, which affirmed the Bankruptcy Court's (i) dismissal of the Adversary Proceeding, (ii) amendment of the confirmation order, and (iii) withdrawal of Alstom's proofs of claim. (9th Cir. Mem., RA 2.)

The Petition seeks review only of the amended confirmation order, with the result, *inter alia*, that the Bankruptcy Court's orders dismissing the Adversary Proceeding and the proofs of claims are now final and no longer appealable.

ARGUMENT

A grant of *certiorari* would be improvident because: (i) on the facts of this case, there is no conflict between the Third and Ninth Circuits' decisions on the interplay between Bankruptcy Code Sections 1141 and 553; (ii) the Ninth Circuit's decision in the instant case is consistent with the "majority rule"; and (iii) any "ruling" by this Court on the merits of Petitioner's claims would merely be an "advisory opinion", because the setoff issue is mooted by Petitioner's failure to seek review of the Ninth Circuit's affirmance of the Bankruptcy Court's dismissal of the Adversary Proceeding.

A. On the facts of this case, there is no actual conflict between the decisions of the Third and Ninth Circuits

A review of the text of Bankruptcy Code Section 1141 and the decisions of (i) the Third Circuit in *United States v. Continental Airlines (In re Continental Airlines)*, 134 F.3d 536 (3d Cir.), *cert. denied*, 525 U.S. 929 (1998), and *Megafoods Stores, Inc. v. Flagstaff Realty Assoc. (In re Flagstaff Realty Assoc.)*, 60 F.3d 1031 (3d Cir. 1995), and (ii) the Ninth Circuit in the case at bar and in *Carolco Television Inc. v. National Broad. Co. (In re DeLaurentiis Entertainment Group Inc.)*, 963 F.2d 1269 (9th Cir.), *cert. denied*, 506 U.S. 918 (1992), on which it is based, readily shows there is no conflict between the Circuits on the facts of the instant case.

1. Section 1141 expressly provides that the terms of the confirmation order govern the respective rights and obligations of the debtor and his creditors.

Section 1141 of the Bankruptcy Code expressly provides that the terms of the plan take precedence over any general rules concerning the consequences of confirmation. Thus, for example, Section 1141 (a) states that "the provisions of a confirmed plan" bind both the debtor and any creditor. Subsection (b) provides that:

> *Except as otherwise provided in the plan or the order confirming the plan*, the confirmation of a plan vests all of the property of the estate in the debtor. (Emphasis added.)

Similarly, Section 1141 (c) states:

> *[E]xcept as otherwise provided in the plan or in the order confirming the plan,* after confirmation of a plan, the property dealt with by the plan is free and

clear of all claims and interests of creditors . . .[3] (Emphasis added.)

In the instant case, the amended "order confirming the plan" expressly provided:

> *Any and all claims, rights, privileges and remedies held by the Debtor against GEC Alsthom* T&D A.G. and GEC Alstom T&D, Inc. (f/k/a Sprecher Energie A.G.), Sprecher + Schuh, Ltd., Sprecher + Schuh Holding A.G., and Sprecher + Schuh, Inc. (collectively, "GEC Alsthom") *and any and all claims, rights, privileges and remedies held by GEC Alsthom against the Debtor shall in no way be altered, impaired or in any way affected by the Plan confirmed by this Order.* Any conflict with this provision contained in Debtor's Plan shall be controlled by this order. (Amended Order Confirming Plan RA 35.) (Emphasis added.)

In short, the amended confirmation order "carved out" from the operation of the Plan the claims and counterclaims (including setoff rights) of Petitioner and Alstom vis-à-vis one another. Including such a provision in the amended order was well within the Bankruptcy Court's discretion. Under Section 1129(a)(3) of the Bankruptcy Code, the operative standard is whether a plan is in "good faith". *See Perry Arden v. Motel Partners (In re Perry Arden)*, 176 F.3d 1226, 1228 (9th Cir. 1999) ("[W]e review for an abuse of discretion the decision to approve a claim compromise as part of a plan . . . ")

This "carve out" was also entirely consistent with the Bankruptcy Court's repeated rulings that those claims

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[3] Subsection (d)'s grant of a discharge to the debtor is also "*[e]xcept as otherwise provided . . . in the order confirming the plan . . .*"

and counterclaims should be arbitrated before the ICC, in accordance with the terms of the subcontract between Alstom and Consort. (*See, e.g.* Adversary Proceeding Dkt. Entry Nos. 101 (Minute Entry dated March 28, 1994) and 133 (Minute Entry dated January 10, 1997).)

2. Whatever the general positions of the Third and Ninth Circuits may be as to the relative priority of Code Sections 1141 and 553, on the facts of this case there is no "conflict" between those Circuits

While both the Third and Ninth Circuits have, in *dicta*, made broad pronouncements as to which of Sections 1141 and 553 should govern if their provisions conflict, their actual decisions are narrowly grounded on the facts.

Indeed, in *Continental Airlines*, the Third Circuit stressed that "the material facts [of the Ninth Circuit's decision] in *DeLaurentiis* distinguish it from the case before us." 134 F.3d at 541. In *DeLaurentiis*, the creditor timely made its setoff claim known to the Bankruptcy Court, the debtor and other creditors before confirmation took place. In marked contrast, in *Continental Airlines*, "the plan of reorganization proceeded on the justifiable assumption that the reorganized debtor faced no set-off claim." *Id.* Moreover, in *Continental Airlines*, "the plan, without objection by the affected creditor, *expressly prohibit[ed] setoff without the debtor's approval.*" 8 COLLIER ON BANKRUPTCY ("COLLIER'S") ¶ 1141.02[3] at 1141-7 (15th ed. revised 2001) (emphasis added).)

The narrow limits of applicability of *Continental Airlines* are vividly illustrated by the Third Circuit's decision, only three years earlier, in *Megafoods Stores, Inc. v. Flagstaff Realty Assoc. (In re Flagstaff Realty Assoc.)*, 60 F.3d 1031 (3d Cir. 1995). There a commercial tenant

that had made repairs to the premises when the landlord breached its obligation to do so, was permitted to recoup[4] its expenditures from future rent obligations after the landlord declared bankruptcy, despite the tenant's failure to object to the plan or appeal confirmation. Further, in *Flagstaff*, the Third Circuit cited with approval *DeLaurentiis* and other cases in which setoff was permitted post confirmation. 60 F.3d at 1036. Since the Court of Appeals in *Continental Airlines* did not even refer to *Flagstaff* (let alone seek to distinguish it), it would appear that it saw no conflict between its two decisions.

In the instant case, unlike *Continental Airlines,* no party could claim ignorance of Alstom's position that (i) it had substantial defenses (including a right of setoff) to the Adversary Proceeding, but (ii) the ICC was the appropriate and exclusive forum for the resolution of all such claims and counterclaims. Alstom repeatedly asserted that position (and Petitioner vigorously opposed it) from the inception of the Adversary Proceeding until the Bankruptcy Court issued its amended order confirming the Plan.

Moreover, the Bankruptcy Court, prior to the confirmation of the Plan, repeatedly ruled that Petitioner's and Alstom's claims and counterclaims against one another had to be adjudicated in another forum. (*See, e.g.* Adversary Proceeding Dkt. Entry Nos. 101 (Minute Entry dated March 28, 1994) and 133 (Minute Entry dated January 10, 1997).)

Consequently, the Ninth Circuit, in the instant case, was not confronted with a situation like that which trou-

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[4] The distinction that the Court of Appeals for the Third Circuit drew between "setoff" and "recoupment" is irrelevant, in the case at bar, since Alstom's claims arise out of the same transaction and contracts as Consort's (and thus Petitioner's) claims against Alstom.

bled the Third Circuit in *Continental Airlines*, 134 F.3d at 542, where a post-confirmation assertion of a setoff right "ha[d] a probability of disrupting the plan of reorganization" or might "unnecessarily protract the bankruptcy proceedings and consume judicial resources" or be "unfair to other creditors and the debtor."

3. The instant case is also distinguishable because, unlike the allegedly conflicting Third Circuit decision, it involves the Bankruptcy Court's discretion in approving a Plan

In the case at bar, the Bankruptcy Court was charged, pursuant to Section 1129(a) of the Bankruptcy Code, with responsibility for determining whether the Petitioner's Plan met the statutory requirements. The issue that was before the Ninth Circuit, on Petitioner's appeal from the Bankruptcy Court's confirmation order, was whether the Bankruptcy Judge abused his discretion in carving out from the Plan an unresolved dispute between the Petitioner and Alstom. *See, e.g., In the Matter of Madison Hotel Assoc.*, 749 F.2d 410, 425 (7th Cir. 1984) ("[T]he court looks to the debtor's plan and determines, in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code . . . The bankruptcy judge is in the best position to assess the good faith of the parties' proposals.") (Citations omitted.); c*f. Perry Arden,* 176 F.3d at 1228 (approval of a compromise of a claim reviewed under an "abuse of discretion" standard).

In marked contrast, the issue before the Third Circuit in *Continental Airlines* was whether to permit a pre-bankruptcy creditor to assert, for the first time, *after confirmation*, a right of setoff when (a) there was no provision for such a setoff in the Plan or the order confirming the Plan and (b) allowance of the setoff may have

adversely impacted other pre-bankruptcy creditors that had no notice of the claim at the time of confirmation.

Thus the instant case is not an appropriate vehicle for resolving any differences that may exist between the Third and Ninth Circuits concerning the interplay of Sections 553 and 1141 of the Bankruptcy Code.

4. The Ninth Circuit's decision is consistent with the "majority rule"

In any event, to the extent that the two Circuits do differ as to the relative priority of Sections 1141 and 553, the Ninth Circuit's construction of the interplay of the Bankruptcy Code's provisions is consistent with the view taken by most courts. *See* 5 COLLIER'S ¶ 553.08[1] ("A majority of the courts that have addressed the issue answer that confirmation and discharge do not prohibit the defensive use of setoff in a subsequent action by the debtor.") (Citations omitted); 8 COLLIER'S ¶ 1141.02[3] ("Courts have disagreed on whether a right of setoff survives confirmation and can be used when a creditor is sued by a former debtor; the trend, however, is in favor of the survival of setoff rights.")

B. This Court should also deny *certiorari* because the purported "conflict" is now moot

An additional reason to deny *certiorari* is that at this time the Court could only issue an "advisory opinion", since there effectively is no remaining "case" or "controversy" between the parties.

Although the Bankruptcy Court dismissed the Adversary Proceeding without prejudice, and Petitioner appealed the dismissal to the BAP and then to the Court of Appeals (both of which affirmed the Bankruptcy Court's order), Petitioner did not ask this Court to review the dismissal order. Consequently, that order

became final and Petitioner no longer has a pending proceeding against Alstom.

Thus, Petitioner's claim against Alstom for purportedly breaching a 1982 subcontract with Consort is time-barred. Under the law of Arizona, where the Adversary Proceeding was pending, the longest potentially applicable Statute of Limitations is eight years. Ariz.Rev.Stat. § 12-552. However, nineteen years have now passed since the alleged breach purportedly occurred.

Since a dismissal without prejudice "leaves the parties in the same legal position as if no suit had ever been filed," *Hilbrun v. Goldberg*, 823 F.2d 881, 883 (5th Cir. 1987), *cert. denied,* 485 U.S. 962 (1988), "the statute of limitations is deemed not to have been suspended during the period in which the suit was pending." *Moore v. St. Louis Music Supply Co., Inc.*, 539 F.2d 1191, 1194 (8th Cir. 1976). *See also*, 8 MOORE'S FEDERAL PRACTICE, ¶41.50[7][b] (3d ed. revised 2001) ("When the district court elects to dismiss an action without prejudice under Rule 41(b), the dismissal leaves the parties in the same legal position as if no suit had been filed. As a consequence, the statute of limitations is not tolled by the filing of the original suit.") (Citations omitted.)

In addition, as more than six months have elapsed from August 30, 2001, the date when the mandate of the Court of Appeals for the Ninth Circuit issued (A 18), Petitioner can no longer commence a new action under the "savings provisions" of Section 12-504(a) of the Arizona Revised Statutes.[5]

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[5] "If an action timely commenced is terminated by . . . dismissal for lack of prosecution, the court *in its discretion* may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.") (Emphasis added.) (RA 37.)

Consequently, due to Petitioner's failure to preserve his challenge to the Bankruptcy Court's dismissal of the Adversary Proceeding, any resolution by this Court of the alleged conflict between the Third and Ninth Circuits will have no effect on Petitioner's claims against Alstom.

CONCLUSION

The petition for *certiorari* should be denied because, on the facts of this case, there is no conflict between the Third and Ninth Circuits. Moreover, the Ninth Circuit's decision is consistent with the "majority rule". Further, the underlying dispute between the parties is now moot, since: (a) Petitioner's claims have been dismissed, without prejudice; (b) Petitioner failed to seek review by this Court of the Ninth Circuit's affirmance of the Bankruptcy Court's dismissal of those claims; and (c), as a result, Petitioner's claims are now time-barred.

Dated: New York, New York
March 15, 2002

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-16871
99-16910

BAP Nos. AZ-97-01124-PRMe
AZ-97-01421-PRMe
(Consolidated)

AZ-98-1410-PRMe
(Related)

In re: BALBIR SINGH TULI,

Debtor.

BALBIR SINGH TULI,

Appellant,

—v.—

SPRECHER ENERGIE A.G.; SPRECHER + SCHUH GROUP,

Appellees.

Appeals from the Ninth Circuit
Bankruptcy Appellate Panel
PERRIS, RUSSELL, and MEYERS,
Bankruptcy Judges, Presiding

Submitted June 11, 2001*
San Francisco, California

MEMORANDUM**

Before:
HILL,*** GRABER, and MCKEOWN,
Circuit Judges.

Plaintiff Balbir Singh Tuli appeals pro se three orders of the bankruptcy court, relating to an adversary proceeding that he instituted against two Swiss companies. The Bankruptcy Appellate Panel (BAP) affirmed, as do we.

1. *Dismissal Without Prejudice of Plaintiff's Adversary Claim*

In 1992, Plaintiff commenced an arbitration against Defendants before the International Chamber of Commerce (ICC) in Paris, as required by the relevant subcontracts for work on an Iraqi power station. A few weeks later, he filed an adversary proceeding against

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The Honorable James C. Hill, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

Defendants in bankruptcy court, pertaining to the same subcontracts.

In 1997, the bankruptcy court dismissed the adversary proceeding without prejudice. One of the alternative grounds for dismissal was failure to prosecute.

The bankruptcy court did not abuse its discretion. The ICC dismissed the arbitration in 1994, in part because Plaintiff had not paid the required fees. He did not restart the arbitration. Later in 1994, the bankruptcy court told Plaintiff that he had to file a motion to vacate the stay if he wanted to resume the adversary proceeding. He had not done so for 20 months when the bankruptcy court entered an order to show cause why the adversary proceedings should not be dismissed for failure to prosecute.

Plaintiff's main argument is that the bankruptcy court did not dismiss for failure to prosecute, but only abstained under 28 U.S.C. § 1334(c)(1). We read the court's order, however, as dismissing the proceeding on two independent and alternative grounds, one of which was failure to prosecute. That ground for dismissal was proper in the circumstances.

2. *Interlocutory Orders*

Plaintiff also challenges three interlocutory orders pertaining to the adversary proceeding. We agree with the BAP that such orders may not be reviewed when the appeal is from a dismissal without prejudice for lack of prosecution. *Ash v. Cvetkov*, 739 F.2d 493, 497-98 (9th Cir. 1984).

3. *Defendants' Motion to Amend*

In 1998, the bankruptcy court confirmed Plaintiff's plan under Chapter 11. The order preserved all claims that Plaintiff had against Defendants. Defendants moved

to amend the order to clarify that, if Plaintiff eventually recovers damages under the Iraqi subcontracts, then Defendants' claims for setoffs against those damages are preserved. The court made that amendment, which Plaintiff now disputes.

Specifically, he argues that any setoff was discharged automatically when the plan was confirmed. To the contrary, this court has held that, under 11 U.S.C. § 553(a), pre-petition rights to a setoff (like those that Defendants assert here) survive the general discharge of debts that occurs, under 11 U.S.C. § 1141, when a plan is confirmed. *Carolco Television, Inc. v. Nat'l Broad. Co. (In re De Lauerentiis Entm't Group Inc.)*, 963 F.2d 1269, 1276 (9th Cir. 1992).

Plaintiff argues that Defendants' generally bad conduct during the course of this long-running dispute should create an exception to the rule in § 553(a). That statute contains three exceptions, none of which is implicated here, and none of which supports Plaintiff's theory. Accordingly, the amendment was permissible.

4. *Withdrawal of Proofs of Claim*

In 1996, Plaintiff filed two proofs of claim in bankruptcy court, against himself and on behalf of Defendants, without Defendants' knowledge or consent. The bankruptcy court granted Defendants' motion to withdraw those claims.

At the time Plaintiff filed the proofs of claim, the adversary proceeding to which they referred was stayed so that the parties could arbitrate their dispute before the ICC. Thus, the proofs of claim relate to debts that were not before the bankruptcy court at the time they were

filed. In the circumstances, Plaintiff could not have been prejudiced, and the bankruptcy court did not abuse its discretion in allowing Defendants to withdraw the proofs of claim.

AFFIRMED.

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

BAP Nos. AZ-97-1124-PRMe
AZ-97-1421-PRMe
(Consolidated)

Bk. No. 91-10615-PHX-RTB

Adv. No. 92-1330

In re: BALBIR SINGH TULI,

Debtor.

BALBIR SINGH TULI,

Appellant,

—v.—

SPRECHER ENERGIE A.G., now known as GEC ALSTHOM T&D A.G. and GEC ALSTHOM T&D, INC.; SPRECHER + SCHUH HOLDING A.G.; SPRECHER + SCHUH LTD.; SPRECHER + SCHUH, INC. (SPRECHER + SCHUH GROUP)

Appellees.

MEMORANDUM[1]

Argued and Submitted on May 20, 1999
at Phoenix, Arizona

Filed – June 9, 1999

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Redfield T. Baum,
Bankruptcy Judge, Presiding

Before:

PERRIS, RUSSELL and MEYERS,
Bankruptcy Judges.

Debtor appeals an order dismissing an adversary proceeding he filed in his bankruptcy case (AZ-97-1124) and an order allowing withdrawal of proofs of claim debtor filed on behalf of appellees Sprecher + Schuh Holding A.G., Sprecher + Schuh, Ltd. and Sprecher + Schuh, Inc. (Sprecher Group) and GEC Alstom T&D, A.G. and GEC Alstom, Inc. (Alstom)[2] (AZ-97-1421).

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 13 and Circuit Rule 36-3.

[2] All appellees will be referred to collectively as "appellees."

Both orders relate to a dispute regarding a 1982 contract for the construction of a power plant in Iraq. The result of the court's orders was to require that any adjudication of that dispute take place in arbitration or in a court other than the bankruptcy court. The two appeals have been consolidated.[3] We AFFIRM on both appeals.

FACTS[4]

Debtor is a contractor. In 1982, he was the managing director of an Indian corporation that he owned, Consort Constructions Ltd. Alstom, a Swiss corporation, entered into a contract with the State Organization of Electricity of the Republic of Iraq to build power plants in Iraq.[5] Alstom then entered into two subcontracts with Consort for performance of the civil work on the projects. The subcontracts provided that all disputes arising out of the

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[3] Debtor has filed a related appeal of an amended order confirming debtor's chapter 11 plan. (AZ-98-1410) A separate decision will issue in that appeal.

[4] Some of the undisputed background facts are taken from the parties' briefs and other pleadings and are not necessarily supported by evidence in the record.

[5] The contract was with Sprecher Energie, the predecessor to Alstom. For ease of reference, we will refer to the company throughout as Alstom.

It is not clear from the record who the Sprecher Group appellees are. According to Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, etc., pp. 2-3, the Sprecher Group defendants are either companies that were predecessors to Alstom, are entities unrelated to Alstom, or are no longer in existence. Because all Sprecher appellees have asserted the same arguments, we will refer to them together.

contracts would be arbitrated by an arbitrator of the International Chamber of Commerce (ICC).[6]

Work commenced on the projects in 1982. In December 1982, Alstom ordered Consort off the job because of alleged defects in performance. In a letter dated February 27, 1984, Alstom set out its understanding of the sums that were due to Consort for Consort's work and also the sums it asserted Consort owed it for alleged breaches of contract. (Ex. 4 to debtor's First Amended Disclosure Statement) Alstom claimed contract damages that exceeded the amount Alstom indicated it owed to Consort.

At some point, Consort assigned its claims against Alstom to debtor. Despite debtor's demand, Alstom has not paid the amounts set out in the 1984 letter, because it asserts that any amounts it owes Consort are more than offset by amounts it alleges Consort owes for Consort's breach of contract.

An involuntary bankruptcy petition was filed against debtor in 1991. The court entered an order for relief in November 1991. In December 1992, Consort and debtor, as assignee of the claims of Consort, commenced an arbitration proceeding against Alstom before the ICC. (Debtor's July 1, 1993 Affidavit in Response to Motions to Dismiss, p. 7) Later in the same month debtor commenced adversary proceeding No. 92-1330 in

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[6] The contracts provide:

> All disputes arising in connection with the present contract shall be finally settled and the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules.
>
> The contract shall be governed by Swiss law.

(Complaint, Ex. 2 ¶ 14)

bankruptcy court against Alstom, and the Sprecher Group, seeking turnover of the amounts set out in Alstom's 1984 letter, pursuant to § 542,[7] as well as additional amounts as damages for alleged breach of the subcontracts. He claims turnover for amounts he asserts are undisputed, and which he claims exceed the amount of any setoff Alstom might have.

In 1994, on appellees' request, the bankruptcy court stayed the adversary proceeding pending arbitration. Shortly thereafter, the ICC dismissed the arbitration proceeding based at least in part on debtor's failure to pay the necessary fees.

In August 1996, after there had been no action in the adversary proceeding for more than 18 months, the bankruptcy court entered an order to show cause why the adversary proceeding should not be dismissed for lack of prosecution. On November 5, the court held a hearing on the order to show cause. It deferred ruling, allowing debtor to file supplemental pleadings. In mid-December, he filed two proofs of claim in the bankruptcy case on behalf of Alstom, asserting claims for set off against the amounts debtor asserts Alstom owes him for the work Consort did on the Iraqi projects. In February 1997, the court dismissed the adversary proceeding without prejudice. It also granted Alstom's motion to withdraw the proofs of claim that debtor had filed on Alstom's behalf and denied debtor's motion to reconsider that ruling.

Debtor appeals.

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[7] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

APPEAL NO. AZ-97-1124

ISSUE

Whether the bankruptcy court abused its discretion in dismissing adversary proceeding No. 92-1330 without prejudice.

STANDARD OF REVIEW

The panel reviews a bankruptcy court's dismissal for failure to prosecute for an abuse of discretion. *Oliva v. Sullivan*, 958 F.2d 272, 274 (9th Cir. 1992); *In re Osinga*, 91 B.R. 893, 894 (9th Cir. BAP 1988).

DISCUSSION

1. *Order dismissing adversary proceeding*

In the court's January 10, 1997, minute entry/order, it concluded that debtor had not timely pursued arbitration, "including but not necessarily limited to payment of required fees." It also said:

> The merits of this dispute relate to an Iraqi construction project with the other parties to the dispute conducting business in Europe and not in the District of Arizona. The only basis for invoking this court's jurisdiction is the jurisdictional grant under 28 U.S.C. § 1334.
>
> This court again concludes that these disputes should be arbitrated. Further, the court also concludes that "in the interests of justice" as that term is used in Section 1334(c)(1) this court should abstain from hearing these disputes thereby allowing these parties, including the debtor, to litigate

> their claims in whatever court may have jurisdiction over them. Therefore, this adversary proceeding should be dismissed, without prejudice.

The court entered an order dismissing the proceeding, consistent with the minute entry/order.

Although debtor argues that the complaint was not dismissed for lack of prosecution,[8] the court's minute entry states two alternative bases for dismissal: lack of prosecution and abstention. We will affirm if there is support in the record for either alternative.

A court has inherent authority to dismiss *sua sponte* for lack of prosecution. *Osinga*, 91 B.R. at 894. In determining whether to dismiss for that reason, the court must consider five factors: (1) the public's interest in an expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on the merits; and (5) the availability of less drastic sanctions. *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); *Osinga*, 91 B.R. at 894. There must also be a showing unreasonable delay. *Henderson*, 779 F.2d at 1423. The court is not required to make explicit findings on the various factors. *Id.* Where, as here, the court does not explicitly consider the factors, the appellate court reviews the record independently to determine whether there was an abuse of discretion. *Osinga*, 91 B.R. at 894.

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[8] Debtor asserts that the dismissal for lack of prosecution was really a stay pending arbitration. At the time it ruled, the court had before it a *sua sponte* order to show cause why the case should not be dismissed for lack of prosecution. The court also noted in the order of dismissal that there were pending motions to dismiss, which included motions to abstain. The adversary proceeding had previously been stayed pending arbitration; that stay had never been dissolved. The court's minute entry/order makes it clear that the alternative bases for dismissal were lack of prosecution and abstention.

The bankruptcy court's decision will not be disturbed unless the reviewing court is left with the definite and firm conviction that the court committed a clear error of judgment after weighing the relevant factors. *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994). Dismissal is a drastic sanction that should be imposed only in extreme circumstances. *Oliva v. Sullivan*, 958 F.2d at 273.

A. *Expeditious resolution of litigation*

In order for a court to dismiss for failure to prosecute, there must be unreasonable delay. The reviewing court gives deference to the trial court to determine what is unreasonable. *Eisen*, 31 F.3d at 1451.

Although the bankruptcy court did not make any specific finding, the record amply supports a conclusion that the delay was unreasonable and that the delay interfered with the expeditious resolution of the proceeding. This adversary proceeding was filed in December 1992. Within 30 days, appellees filed motions to dismiss, abstain, or to stay pending arbitration. Those motions were not resolved until April 1994, due to numerous supplemental briefs and extensions of time to file documents, as well as debtor's attempts to compel discovery with regard to his response to the motions to dismiss. The court granted the stay pending arbitration in April 1994, and debtor appealed. The appeal was dismissed as interlocutory in September 1994. In the meantime, the pending ICC arbitration was dismissed due in part debtor's failure to pay the required fee.

The court held a status conference on December 6, 1994 at debtor's request, at which the court told debtor that he should file a motion to vacate the stay if that was what he wanted to do, in light of the dismissal of the ICC arbitration. (Transcript of December 6, 1994 hear-

ing, pp. 6, 8, 10) Debtor did not take any action to vacate the stay at that time. There was no other activity until the order to show cause issued on August 14, 1996.

The absence of any activity for more than a year and a half is an unreasonable delay. The case had been pending for more than four years when it was dismissed. Debtor claims that he was unable to arbitrate because he lacked the funds to move forward with the arbitration and that he needed an adjudication of the turnover action in order to obtain the funds for arbitration of the remaining claims. He asserted that he did not file a motion to vacate the stay, despite the court's urging, because he thought the court was too busy to hear this proceeding and because it was too late to file a motion to withdraw reference. He represented that he decided to seek funds elsewhere to pay for the arbitration, including pursuing other adversary proceedings. *Id.*

Even assuming that debtor did not have sufficient funds to pursue arbitration,[9] a plaintiff's financial difficulties do not excuse a plaintiff's delay. *Malone v. U.S. Postal Service*, 833 F.2d 128 (9th Cir. 1987); *Eisen*, 31 F.3d at 1452. Nor does debtor's belief that he could not file a motion to vacate the stay, in light of the court's specific invitation to do that, or his choice to pursue other litigation in lieu of pursuing this proceeding.

Debtor belatedly filed a motion to vacate the stay pending arbitration and motion for summary judgment after the order to show cause issued. That motion does not weigh against dismissal. Debtor cannot use actions after the show cause order issued as evidence of diligence in prosecuting the action. *Eisen*, 31 F.3d at 1452.

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[9] It is not clear from the record that debtor in fact lacked the funds to arbitrate.

Based on the more than four-year pendency of the proceeding without a significant move toward resolution, and debtor's failure to provide an adequate excuse for the delay, there was an unreasonable delay that weighs in favor of dismissal.

B. *Need to manage court's docket*

This factor is usually reviewed in connection with the public's interest in an expeditious resolution of the dispute to determine whether the delay was unreasonable. The reviewing court defers to the trial court because it is better aware when its docket may become unmanageable. *Eisen*, 31 F.3d at 1452.

In this case, the adversary proceeding had been pending more than four years when it was dismissed. This factor weighs in favor of dismissal.

C. *Risk of prejudice to defendants*

Failure to prosecute diligently is sufficient in itself to justify dismissal, even in the absence of actual prejudice to the defendants. Prejudice is assumed from unreasonable delay. The presumption of prejudice is rebuttable. *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976); *Eisen*, 31 F.3d at 1452.

The dispute in this case arose in 1984. Debtor filed his adversary proceeding in 1992. The case then languished in the bankruptcy court, despite dismissal of the arbitration action, for more than four years. Debtor does not assert any facts that would rebut the presumption of prejudice.

D. *Disposition of cases on their merits*

The policy favoring disposition of cases on their merits is weighed against the delay and prejudice to the

defendants. The court is not to consider the merits of the underlying case. *Eisen*, 31 F.3d at 1454. It is the responsibility of the plaintiff to move the case toward disposition at a reasonable pace. *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991). Debtor did not move this case toward disposition at either the bankruptcy court or the arbitration level.

E. *Availability of less drastic sanctions*

A court must make a reasonable exploration of possible and meaningful alternatives to dismissal. *Morris*, 942 F.2d at 652. However, the Ninth Circuit has never required an explicit discussion of alternative sanctions before for an order of dismissal can be upheld. *Eisen*, 31 F.3d at 1454 "[U]nder egregious circumstances, it is unnecessary (although helpful) for the trial court to discuss why alternatives to dismissal are infeasible." *Osinga*, 91 B.R. at 895; *Eisen*, 31 F.3d at 1454.

The circumstances of this case, including the age of the case at dismissal, the lack of progress toward resolution, and the complete lack of activity for more than 18 months, are egregious, so there is no need for a discussion of alternatives to dismissal. Further, from those circumstances it appears that the court was well within its range of discretion in dismissing for lack of prosecution.

The court acted within its discretion in dismissing the adversary proceeding for lack of prosecution. Thus, we affirm the dismissal on this basis and need not consider the alternative abstention basis for dismissal.

2. *Other orders*

Debtor seeks review of three other orders in this appeal of the order of dismissal: the November 14, 1993 order denying debtor's motion to compel depositions in

the adversary proceeding; the April 21, 1994 order granting appellees' motion to stay the adversary proceeding pending arbitration; and the January 17, 1997 order denying confirmation of debtor's plan of reorganization. Appellees argue that those orders are not reviewable in an appeal from a dismissal for lack of prosecution.

The general rule is that interlocutory rulings that are unappealable merge into a final judgment and are reviewable in an appeal from the final judgment. *Ash v, Cvetkov*, 739 F.2d 493, 497 (9th Cir. 1984). The Ninth Circuit has held that the general rule should not apply when the case has been dismissed without prejudice for lack of prosecution: "[I]nterlocutory rulings do not merge into a judgment of dismissal without prejudice for failure to prosecute whether the failure to prosecute is purposeful or is a result of negligence or mistake." *Id.* at 498. The court reasons that allowing review of otherwise unappealable orders would encourage litigants who obtain unfavorable interlocutory rulings to fail to prosecute and let the case be dismissed for lack of prosecution, thereby obtaining review of otherwise unreviewable orders. *Id.* at 497. If there is good cause for reviving the case after a dismissal for lack of prosecution, the entire case will be revived, thereby also reviving the appealability of interlocutory orders once a final judgment is entered. *Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir. 1996).

In view of the policies supporting appellate courts' refusal to review interlocutory orders after a dismissal for lack of prosecution, we decline to review the two interlocutory orders that were entered in the adversary proceeding, which are the order denying debtor's motion to compel depositions and the order staying the proceeding pending arbitration. The third order, the order

denying confirmation of debtor's plan, was entered in debtor's main bankruptcy case, not in the adversary proceeding. An order in the main bankruptcy case would not merge with the judgment of dismissal in the adversary proceeding, regardless of the reason for dismissal. The order was entered on January 22, 1997, and debtor's notice of appeal was filed on February 18, 1997. The appeal of the order is therefore untimely, and we cannot review it. *See In re Crystal Sands Properties*, 84 B.R. 665 (9th Cir. BAP 1988) (a timely notice of appeal is jurisdictional).

APPEAL NO. 97-1421

ISSUES

1. Whether the bankruptcy court abused its discretion in allowing Alstom to withdraw the proofs of claim debtor filed on Alstom's behalf.

2. Whether the bankruptcy court abused its discretion in denying reconsideration of the order granting Alstom's motion to withdraw the proofs of claim.

STANDARD OF REVIEW

A court's decision to allow withdrawal of proofs of claim is reviewed for abuse of discretion. *In re Lowenschuss*, 67 F.3d 1394, 1399 (9th Cir. 1995). The panel reviews a court's denial of a motion for reconsideration for abuse of discretion. *In re Nunez*, 196 B.R. 150, 155 (9th Cir. BAP 1996); *In re Negrete*, 183 B.R. 195, 197 (9th Cir. BAP 1995), *aff'd* 103 F.3d 139 (9th Cir. 1996) (table); *In re Sandoval*, 186 B.R. 490, 493 (9th Cir. BAP 1995).

DISCUSSION

Debtor appeals the order allowing withdrawal of proofs of claim he filed on behalf of Alstom and of the order denying reconsideration of that order. Alstom argues that, because the minute entry/order granting its motion was not a final, appealable order, the panel may review only the order denying debtor's motion for reconsideration of that order.

Where, as here, a motion for reconsideration is filed before entry of an order or judgment, the motion is treated as one to amend a judgment under Fed. R. Civ. P. 59. *See In re Crystal Sands Properties*, 84 B.R. at 668 n.3. In examining the denial of a motion to amend a judgment, the appellate court may review both the denial of the motion as well as the underlying order. *Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir. 1989).

Alstom is correct that, at the time the notice of appeal was filed, the court had announced its decision on the motion to strike or withdraw, but had not entered a final order.[10] After the briefs were submitted in this appeal, the panel issued an order requiring Alstom to lodge an order disposing of the motion to strike or withdraw proofs of claim. The order was lodged on April 21, 1999, and the court entered the order allowing withdrawal of the proofs of claim on April 28, 1999. Therefore, because the bankruptcy court has now entered a final order granting the motion to withdraw proofs of claim, debtor is entitled to review of the merits of both the original order and the order denying reconsideration.

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[10] Alstom's motion was in the alternative, asking either to strike the proofs of claim or to allow their withdrawal. The court's final order made clear that it was allowing withdrawal.

1. *Order allowing Alstom to withdraw the proofs of claim debtor filed on their behalf*

Fed. R. Bankr. P. 3006 provides that a creditor may not withdraw a claim "except on order of the court after hearing on notice to the trustee or debtor in possession . . . ."[11] In deciding whether to grant a creditor's request to withdraw a claim, the court is governed by the same considerations that underlie Fed. R. Civ. P. 41(a)(2), relating to voluntary dismissals of complaints. *Lowenschuss*, 67 F.3d at 1399. The court should allow withdrawal unless the debtor will suffer some legal prejudice as a result of the withdrawal. *Id.* The inconvenience of defending another lawsuit does not constitute prejudice. *Id.* at 1400.

Although the rule does not specifically allow a creditor who has had a claim filed on the creditor's behalf to withdraw that claim, a creditor should have at least as much right to withdraw a proof of claim filed by a debtor on its behalf as it would to withdraw a proof of claim it filed itself. Debtors would not be harmed by such a rule, because they could block withdrawal by showing prejudice.

Debtor objected to the claims that he filed on Alstom's behalf, but he did not argue or try to demonstrate that withdrawal of the claims would cause him any prejudice. Nor is prejudice apparent from the record.

Debtor argued to the bankruptcy court that his proof of claim should stand because it was based on an informal proof of claim filed by Alstom.

Documents that "state an explicit demand showing the nature and amount of the claim against the estate, and evidence an intent to hold the debtor liable" can

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[11] The rule also provides that a creditor may withdraw a claim as of right under certain circumstances. No one argues that those circumstances exist in this case.

constitute informal proofs of claim. *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 815 (9th Cir. 1985). Debtor referred to two of Alstom's pleadings as their informal proof of claim: a Memorandum of Points and Authorities appended to debtor's Expedited Motion to Extend Deadline for Plan Confirmation, and Document #100 in the adversary proceeding, which is Alstom's Reply Memorandum in Support of the Motion to Strike Plaintiff's 11/29/93 Notice.

Even assuming that the pleadings to which debtor refers meet the requirements for an informal proof of claim, debtor does not explain why Alstom would be prevented from withdrawing that informal proof of claim. Nor is there any reason why a creditor should be prohibited from withdrawing an informal proof of claim under circumstances that would support withdrawal of a formal proof of claim. Because debtor did not demonstrate any prejudice, the bankruptcy court did not abuse its discretion in allowing withdrawal of the debtor-filed proofs of claim.[12]

2. *Motion for reconsideration*

Debtor appeals the order denying reconsideration of the court's order granting Alstom's motion to withdraw proofs of claim, but does not present any argument with regard to that order. His motion for reconsideration was in response to the court's suggestion at the hearing on

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[12] Debtor asserts that the court abused its discretion in failing to sustain his objections to the claims that he filed on Alstom's behalf. In light of the bankruptcy court's ruling on Alstom's motion to withdraw the proofs of claims, any objections to those claims were moot. Further, even if the claims were deemed disallowed because Alstom failed to respond timely to debtor's objections, the court could have considered Alstom's motion as one to reconsider the disallowance of the claims under Fed. R. Bankr. P. 3008.

the motion that, if debtor had more authorities he wanted the court to consider, he should submit them in a motion for reconsideration. The motion for reconsideration merely cited cases without any argument.

A party seeking to amend a judgment under Fed. R. Civ. P. 59(e) must raise one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error of law or prevent manifest injustice. *All Hawaii Tours Corp. v. Polynesian Cultural Center,* 116 F.R.D. 645, 649 (D. Haw. 1987), *rev'd on other grounds*, 855 F.2d 860 (9th Cir. 1988). Debtor's motion reargued the law but did not show any clear error of law.[13] The court did not abuse its discretion in denying his motion for reconsideration.

CONCLUSION

In Appeal No. AZ-97-1124, the bankruptcy court did not abuse its discretion in dismissing the adversary proceeding without prejudice, based on a lack of prosecution. In Appeal No. AZ-97-1421, the court did not err in allowing Alstom to withdraw the proofs of claim that debtor filed on Alstom's behalf or in denying reconsideration of that order. We therefore AFFIRM in both appeals.

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[13] The cases debtor cited dealt with the court's jurisdiction over claims, the right to jury trials in bankruptcy proceedings, and withdrawal of claims as a matter of right under Fed. R. Bankr. P. 3006. None showed that the court committed an error of law by allowing withdrawal of the proofs of claim.

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

BAP No. AZ-97-1410-PRMe
Bk. No. 91-10615-PHX-RTB

In re: BALBIR SINGH TULI,

Debtor.

BALBIR SINGH TULI,

Appellant,

—v.—

SPRECHER ENERGIE A.G., now known as GEC ALSTHOM T&D A.G. and GEC ALSTHOM T&D, INC.; SPRECHER + SCHUH LTD.; SPRECHER + SCHUH HOLDING A.G.; SPRECHER + SCHUH, INC.,

Appellees.

MEMORANDUM[1]

Argued and Submitted on May 20, 1999
at Phoenix, Arizona

Filed – June 30, 1999

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Redfield T. Baum,
Bankruptcy Judge, Presiding

Before:

PERRIS, RUSSELL and MEYERS,
Bankruptcy Judges.

Debtor Balbir Singh Tuli (debtor) appeals an amended order confirming his chapter 11[2] plan of reorganization. He asserts that the bankruptcy court erred in adding language to the confirmation order that carved out claims by and against appellees GEC Alstom A.G. and GEC Alstom T&D, Inc. (Alstom) and Sprecher + Schuh, Ltd.,

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 13 and Circuit Rule 36-3.

[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

Sprecher + Schuh Holding A.G. and Sprecher + Schuh, Inc. (Sprecher)[3] from the effect of the plan and from discharge. We AFFIRM.

FACTS

Debtor, who is a contractor, has been engaged for some years in a dispute with appellees with regard to a contract to build power plants in Iraq in the early 1980's. The facts relating to that dispute are more completely set out in our unpublished decision in two consolidated appeals, BAP No. AZ-97-1124 and AZ-97-1421. For purposes of this appeal, it is enough to say that debtor asserts that appellees owe him money for work he performed on the construction project, and appellees assert that any amounts they owe debtor are more than set off by amounts they assert debtor owes them. After an involuntary chapter 11 petition was filed against debtor in 1991, debtor commenced an adversary proceeding in an effort to obtain a determination of those disputes. The bankruptcy court stayed the proceeding pending arbitration before the International Chamber of Commerce (ICC), based on an arbitration provision in the contracts. The dispute was never arbitrated, and in 1997, the court dismissed the adversary proceeding for lack of prosecution. Debtor then filed proofs of claim on behalf of Alstom, apparently attempting to get the bankruptcy court to determine the claims in the context of the main bankruptcy case, despite the court's earlier determination that the claims should be arbitrated. The bankruptcy court allowed Alstom's motion to withdraw those proofs of claim. Debtor's appeal of the order dismissing the adversary proceeding for lack of prosecution and the

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[3] We refer to Alstom and Sprecher collectively as "appellees."

order allowing withdrawal of proofs of claim are disposed of in a separate Memorandum decision issued on June 9, 1999.

The court advised debtor that it would not approve any plan of reorganization that deprived appellees of their right to contest whether they owed money to debtor. On June 3, 1998, the court confirmed debtor's chapter 11 plan. Debtor submitted an order for the court's signature that provided that debtor was discharged of all dischargable debts, and preserved all claims by debtor against appellees. The court entered the order, and Alstom moved to amend the order to also preserve its claims against debtor. The bankruptcy court entered an amended order, which excepted from debtor's discharge any debt owed to appellees and preserved appellees' claims against debtor.

Debtor appeals. He asks that the Panel modify the amended order confirming the plan to delete language that preserves claims held by appellees against debtor.

ISSUES

1. Whether the appeal is moot.

2. Whether the bankruptcy court abused its discretion in granting Alstom's motion to amend the order confirming the plan to include language carving out the claims by and against appellees from the effect of the plan.[4]

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[4] The motion to amend was filed by Alstom. The amended order carves out the claims of all appellees, and all appellees argue for affirmance of the order.

STANDARD OF REVIEW

The Panel reviews a court's ruling on a motion to amend pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e) for abuse of discretion. *In re Sandoval*, 186 B.R. 470, 493 (9th Cir. BAP 1995).

DISCUSSION

1. *The appeal is not moot.*

Sprecher filed a motion to dismiss based on mootness, which remains pending. An appeal becomes moot "when the appellant fails to obtain a stay pending appeal and events occur which prevent the court from fashioning effective relief." *In re Beatty*, 162 B.R. 853, 856 (9th Cir. BAP 1994). An appeal of a plan confirmation order may become moot if a party opposing the plan failed to obtain a stay pending appeal, and the plan has been carried out to substantial culmination, *In re Arnold & Baker Farms*, 85 F.3d 1415, 1419 (9th Cir. 1996), or the rights of third parties have intervened. *In re Spirtos*, 992 F.2d 1004, 1006 (9th Cir. 1993). Effective relief is impossible if funds have been disbursed to non-parties or if the failure to obtain a stay has permitted such a comprehensive change of circumstances as to make it inequitable to consider the merits of the appeal. *E.g.*, *Beatty*, 162 B.R. at 856; *In re Blumer*, 66 B.R. 109, 113 (9th Cir. BAP 1986), *aff'd* 826 F.2d 1069 (9th Cir. 1987) (table). The burden is on the moving party to demonstrate that the appeal is moot. *In re Pintlar Corp.*, 124 F.3d 1310 (9th Cir. 1997); *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994).

Debtor did not obtain a stay pending appeal. Exhibits D and E to Sprecher's motion to dismiss show that debtor has distributed approximately $122,000 pursuant

to the plan. Real property in Louisiana apparently has been transferred or is awaiting transfer pending the parish clerk's deletion of mortgages from the records. Sprecher argues that this evidence shows that the plan has been substantially consummated and that the rights of third parties have intervened, therefore the appeal of the order confirming the plan is moot.

Sprecher has failed to show that debtor's transfer of property or payment of claims of third parties would preclude the Panel from fashioning effective relief in this case. Although debtor appeals the amended order confirming the plan, he does not challenge confirmation of the plan, of which he was the proponent. Instead, debtor challenges the language that the court added in response to Alstom's motion to amend the order, which carves out from the effect of the plan the rights and claims of all appellees against debtor. In substance, he is challenging the court's allowance of Alstom's motion to amend the order confirming the plan. If we conclude that the court erred in granting that motion by adding the disputed language, we can fashion effective relief on appeal by deleting the language about which debtor complains.[5] Sprecher has not shown that deletion of the carve-out language would have any effect on the other creditors or the distributions and transactions that have occurred pursuant to the plan. We conclude that the appeal is not moot, and deny the motion to dismiss.

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[5] In its Reply to Appellant's Response to the Motion to Dismiss, Sprecher argues that the Panel has authority only to reverse the order confirming the plan, not to modify it by striking particular language. Fed. R. Bankr. P. 8013 provides that the "bankruptcy appellate panel may affirm, *modify*, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." (Emphasis supplied.) The plain language of Rule 8013 supports a modification if the appeal warrants it.

2. *The bankruptcy court did not abuse its discretion in granting Alstom's motion to amend the order confirming the plan.*

Debtor argues that the court erred in carving out from discharge and from the effect of the plan any claims appellees have against debtor. Although his argument is not clear, he appears to assert that the court could not except those claims from his discharge without an adversary proceeding,[6] and that Alstom has lost its claims to setoff by failing to obtain a determination of those rights and by its inequitable conduct in the bankruptcy case.

Section 1141(d)(1)(A) provides that, except as otherwise provided in the plan or in the order confirming the plan, confirmation of a plan "discharges the debtor from any debt that arose before the date of such confirmation . . . ." That provision gives the court authority to approve a plan that carves out specified claims from the general discharge set out in § 1141(d).

The bankruptcy court did not abuse its discretion in carving out any claims to setoff that appellees might have against debtor. Although the language of the amended order confirming the plan is very broad and could be read to preserve claims against debtor personally, we asked counsel at oral argument whether appellees asserted any claims against debtor personally or whether their claims were limited to claims of setoff. Counsel for Alstom said that he could not respond without consulting with his client. After oral argument, we entered an order requiring appellees to advise the Panel whether they would stipulate that the language of the

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[6] Fed. R. Bankr. P. 7001 provides that a proceeding to determine the dischargeability of a debt must be brought as an adversary proceeding.

order should be interpreted to preserve only claims to a right to setoff. Counsel for both appellees have responded with stipulations that the reservation of rights included in the amended order confirming the plan should be interpreted as reserving only their right, if any, to setoff and not as including any right to affirmative relief against debtor. Pursuant to that stipulated interpretation of the amended order, the only claims preserved are claims of setoff.

Section 553(a) provides that, with exceptions not relevant here,

> this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . . .

The Ninth Circuit has held that a creditor's rights to setoff survive a § 1141 discharge. In *In re De Laurentiis Entertainment Group, Inc.*, 963 F.2d 1269 (9th Cir. 1992), the debtor filed a plan of reorganization, which was confirmed, under which a new entity, Carolco Television, Inc. (CTI), acquired the rights of the debtor to a claim for $1.25 million against the National Broadcasting Co. (NBC). During the debtor's bankruptcy case, NBC had asserted a right to setoff against that claim for a $1.6 million debt it claimed the debtor owed to NBC. The plan of reorganization provided that the debtor's right to the $1.25 million claim against NBC was transferred "free and clear" of all prebankruptcy interests not listed in the plan. Although NBC's $1.6 million claim was not listed in the plan, NBC did not object to the plan or contest the order confirming the plan. *Id.* at 1271.

CTI sued NBC on the prebankruptcy debt, and NBC asserted its claim as a setoff against the debt. CTI objected to the setoff claim, arguing that the debt had been discharged when the plan was confirmed.

The court considered the apparent conflict between § 1141, which provides that property dealt with by the plan is free and clear of all claims and interests of creditors, and that the order confirming the plan discharges the debtor from debts that arose before confirmation, and § 553(a), which "protects the right to a setoff from the operation of the remainder of the bankruptcy code." *Id.* at 1274. The court concluded:

> [S]ection 553 must take precedence over section 1141. In reaching this conclusion, we rely not only on . . . persuasive authority, but also on the language and structure of section 553 and the policies which underlie it. Section 553 provides that, with listed exceptions not relevant here, "this title does not affect the right of any creditor to offset a mutual debt . . . ." This language not only establishes a right to setoffs in bankruptcy, subject to enumerated exceptions, but seems intended to control notwithstanding any other provision of the Bankruptcy Code. To give section 1141 precedence would ignore this language.

Id. at 1276. The court also recognized that

> the primacy of setoffs is essential to the equitable treatment of creditors. A setoff is allowed as a defense to a claim brought by the debtor against a creditor. The creditor can claim only an amount large enough to offset its debt; it cannot collect anything from the debtor. Absent a setoff, a creditor . . . is in the worst of both worlds: it must pay its debt to the debtor in full, but is only entitled to

> receive a tiny fraction of the money the debtor owes it. It was to avoid this unfairness to creditors that setoffs were allowed in bankruptcy in the first place.

Id. at 1277.

Under that holding, § 553(a) automatically preserved any right appellees had to set off their claims against amounts debtor asserts appellees owe him. The court's addition of language providing that debtor's discharge does not cover appellee's claims, and that the claims by and against debtor are preserved, merely clarified the effect of § 553(a) on the claims of these parties. Adding that language was not an abuse of discretion.

Further, the bankruptcy court in 1994 had ordered that the dispute between debtor and appellees be resolved through arbitration before the ICC. The court made it clear to debtor on numerous occasions that the claims should be resolved in a forum other than the bankruptcy court. The bankruptcy court did not abuse its discretion in using the carve-out language in the amended order confirming the plan to implement its earlier orders requiring that the claims be resolved outside the bankruptcy process. *See* § 105(a).

Debtor also argues that Alstom lost any right to setoff by failing to obtain a determination of its claims and by what debtor asserts was Alstom's inequitable conduct in the case. Any argument regarding Alstom's loss of setoff rights should be addressed to and resolved by the tribunal that adjudicates the contract dispute between these parties.

CONCLUSION

This appeal is not moot, because it challenges only the language added to the order confirming the plan, and the Panel could fashion effective relief. The bankruptcy court did not abuse its discretion in amending the order confirming the plan to preserve the setoff claims of appellees against debtor. As appellees have stipulated, the amended order does not permit appellees to seek affirmative relief against debtor. We AFFIRM.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

Filed June 1, 1998

Case No. 91-10615-PHX-RTB

Chapter 11

In Re: BALBIR SINGH TULI,

Debtor.

AMENDED ORDER CONFIRMING PLAN

The plan ("Debtor's Third Alternative, Modification of His First Amended Plan of Reorganization Dated 2/10/97, Consolidated 5/15/97, Submitted 7/7/97 After Incorporating Settlements Since Made Effected and Corrected, Reconsolidated 7/8/97 Without Materially and Adversely Affecting Any Class Already Voted") under Chapter 11 of the Bankruptcy Code filed on or about June 15, 1995, modified and/or amended December 5, 1996, December 31, 1996, February 10, 1997, May 15, 1997, July 7, 1997 and July 8, 1997, having been transmitted to creditors, and it having been determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. 1129(b) have been satisfied;

IT IS ORDERED THAT:

The Plan filed by the Debtor is confirmed.

Except as set forth below, the above-named Debtor is released from all dischargeable debts.

Any judgment heretofore obtained in any court other than this Court is null and void as a determination of personal liability of the Debtor with respect to any of the following:

Debts dischargeable under 11 U.S.C. 532(a);

Unless heretofore or hereafter determined by order of this Court to be nondischargeable, debts alleged to be excepted from discharge under 11 U.S.C. 523(a)(2),(4) and (6);

Debts determined by this Court to be discharged.

All creditors whose debts are discharged by this Order and all creditors whose judgments are declared null and void above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named Debtor.

IT IS FURTHER ORDERED THAT:

Any and all claims, rights, privileges and remedies held by the Debtor against GEC Alsthom T&D A.G. and GEC Alsthom T&D, Inc. (f/k/a Sprecher Energie A.G.), Sprecher + Schuh, Ltd., Sprecher + Schuh Holding A.G., and Sprecher + Schuh, Inc. (collectively, "GEC Alsthom") and any and all claims, rights, privileges and remedies held by GEC Alsthom against the Debtor shall in no way be altered, impaired or in any way affected by the Plan confirmed by this Order. Any conflict with this provision contained in Debtor's Plan shall be controlled by this order.

IT IS FURTHER ORDERED THAT:

Any and all claims against and any and all assets of Consort Construction (97-01409-PHX-RTB) shall in no way be altered, impaired, administered or in any way affected by the Plan confirmed by this Order except as specifically ordered by this Court.

IT IS FURTHER ORDERED THAT:

After confirmation and until this case is officially closed, dismissed or converted, the Debtor shall comply with the requirements of 28 U.S.C. 1930(a)(6) by payment of quarterly fees to the United States Trustee, and shall file with the Court and supply to the United States Trustee the required monthly reports.

DATED: June 1, 1998.

HONORABLE REDFIELD T. BAUM
HONORABLE REDFIELD T. BAUM
United States Bankruptcy Judge

Arizona Revised Statutes § 12-504 (2001)

§ 12-504. Saving of action timely commenced; defense or counterclaim; improper plaintiff; applicability

A. If an action is commenced within the time limited for the action, and the action is terminated in any manner other than by abatement, voluntary dismissal, dismissal for lack of prosecution or a final judgment on the merits, the plaintiff, or a successor or personal representative, may commence a new action for the same cause after the expiration of the time so limited and within six months after such termination. If an action timely commenced is terminated by abatement, voluntary dismissal by order of the court or dismissal for lack of prosecution, the court in its discretion may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.

B. The provisions of subsection A apply to judgments on appeal. The date of issuance of the mandate by the appellate court constitutes the date of termination of the action for the purposes of computing the time limited for commencement of the new action.

C. If a new action on the same cause of action is commenced by the plaintiff, his successor or his personal representative, the assertion of any cause of action or defense by the defendant in the new action is timely if it was or could have been timely asserted in the prior action.

D. If an action timely commenced is dismissed because the named plaintiff is not the proper party to bring the action, the provisions of this section apply to an action subsequently brought by the proper party, pro-

vided that the dismissed action was sufficient to put the defendant on notice of the claim sought to be asserted.

E. The provisions of this section are applicable to actions terminated by orders of dismissal entered on or after the effective date of this section.